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Supreme Court of the United States

OCTOBER TERM, 1966

NO. [redacted] 239

PENN TOWNSHIP

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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IN THE

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NO. 1421

PENN TOWNSHIP

v.

YECKO BROS., George C. Schmidt, Ada A. Schmidt, and all other interested persons of Penn Township, Butler County, Pennsylvania

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. Did the opening of a junkyard and the sale of 15 used automobile parts for prices ranging from $1.00 to $3.00 over a period of eight days without any substantial investment made, excepting the placing of a used bus on wheels and a few junked automobiles on the premises and without obtaining a permit to do so, establish such a non-conforming use a few days before the actual passage of a zoning ordinance, as would entitle defendants to continue the operation of a business prohibited under

the ordinance after they had been notified that such a business was prohibited under the pending ordinance?

II. Did the action of the Supreme Court of Pennsylvania after it had found that defendants had actual notice on June 28, 1952, before occupying the land, that the zoning ordinance prohibiting such activities would be passed on August 13 and that their action was a calculated device to circumvent the ordinance, before they had legal title to the land but after they had occupied it, amount to a violation of the equal protection clause and due process clause of the Fourteenth Amendment to the United States Constitution?

COUNTER STATEMENT OF THE CASE

In this action in equity, appellant, Penn Township, a township of the second class located in Butler County, Pennsylvania, was intervenor in a proceeding in which 121 individual plaintiffs asked for an injunction against the defendant's Yecko Bros. operation of an automobile junkyard or "graveyard."

The defendants, Yecko Bros., operate the junkyard on land owned by George C. Schmidt and Ada Schmidt with whom they had an agreement in writing to purchase the land if they would be permitted to operate the yard.

The action by Penn Township is based on a violation of a zoning ordinance passed by the township on August 23, 1962, which prohibits the operation of such a business in the location in question, classified by the ordinance as a "C" or "Roadside Commercial District."

Some years prior to June 28, 1962, Penn Township had created a Planning Commission. This commission made recommendations for a zoning ordinance for the township. The commission held many public meetings to discuss and revise the terms of the ordinance of which public notice was always given.

On June 28, 1962, Ordinance No. 39 was publicly advertised for adoption at a meeting of the township supervisors to be held on August 13, 1962 and to become effective ten days thereafter, August 23, 1962.

On July 2, 1962, George C. Schmidt and Ada A. Schmidt entered into a written agreement with Albert S. Yecko, wherein they agreed to sell and convey to the latter four acres of land on the eastern side of New

Route 8, a four lane highway running from Pittsburgh to Butler which contained a provision that if there was an ordinance of the township in existence prohibiting "a used auto parts business or wrecking yard being conducted in a building" all hand money was to be returned and the agreement rendered null and void. One of the defendants, Albert Yecko, was a party to this agreement (P. 55a).

On July 9, 1962, the Yecko Brothers, Albert and Phillip, appeared at a public meeting of the township supervisors and requested approval for the establishing and operation of an auto wrecking and parts business. They were referred to Norman Patterson, Chairman of the Planning and Zoning Commission, since a public meeting was advertised for July 17, 1962, and such requests should be made to the commission pending rejection or adoption of the ordinance.

Without obtaining this approval Yecko Bros. occupied the property on July 27, 1962, by installing a bus used as an office, storing a few wrecked automobiles and erecting a sign bearing the words "Yecko Bros. Auto Parts."

A preliminary injunction was issued on August 4, 1962, on the complaint of the individual plaintiffs, claiming the defendants were in violation of Ordinance No. 39, of the Township prohibiting auto junkyards, enjoining defendants from operating that type of business. From July 27 to August 4, defendants sold fifteen small items or parts.

On August 13, 1962, the Zoning Ordinance was enacted.

The Township of Penn on application and complaint averring defendants were violating the provisions of the Zoning Ordinance was permitted to intervene as party plaintiff by order of Judge Rodgers dated October 29, 1962 (P. 39a).

October 29, 1962, a hearing on the Bill for Injunction was held before the Honorable Herman M. Rodgers of Mercer County, specially presiding. Stipulations of fact were entered into by counsel for all parties.

On February 19, 1964, Judge Rodgers in a written opinion and order refused the injunction for the reason that defendants had established their business and there was no legal restriction upon them in the use of their property, since the zoning ordinance had no retroactive effect and the junkyard ordinance was unconstitutional (P. 70a).

Exceptions were filed by the township to certain findings of fact, the failure to find certain conclusions of law requested, and the decree refusing the injunction.

On appeal to the Supreme Court of Pennsylvania the Order of the lower court was reversed in an opinion filed January 4, 1966 to which there was no dissent.

ARGUMENT

I. Petitioners Were Not Denied Equal Protetction by the Zoning Ordinance as They Were Given by Its Terms the Right to Establish in Good Faith a "Non-Conforming Use"—Which They Failed to Do.

The ordinance in question contains a specific exemption for nonconforming uses.

The rule permitting a landowner to continue a nonconforming use of property in a certain area applies only to a lawful existing nonconforming use which existed at the time of passage of the zoning ordinance or regulation, *Hanna v. Board of Adjustment of Forest Hills,* 183 A. (2) 539, 408 Pa. 306.

The Chancellor in discussing the issues reasoned that "the business was operated for 8 days prior to the effective date of the ordinance. Fifteen sales of used auto parts were made in seven days before passage of the ordinance."

In *Ashline v. Bristol Board of Adjustment,* 408 Pa. 245, the Supreme Court said: *"Nor will the manifestly casual use of a property by the owner thereof, inconsistent with the terms of the ordinance and prior to the effective date thereof, commit the premises to a nonconforming use status."* Citing *Kiddy's Appeal,* 294 Pa. 209. We cite the case because the discussion of the second principle involved is exactly in point with our case. The Supreme Court stated it thus:

> "It is contended that at the time of the passage of the Zoning Ordinance on Nov. 28, 1952, and for some time prior thereto, a portion of the land had been used for similar purposes. The court below, which

heard the case de novo, found that the use of the property in this respect was only 'casual and incidental,' *and so minor that it was not sufficient to constitute* a 'nonconforming use.' A reading of the record readily manifests the correctness of this conclusion."

THE RULE FOR ESTABLISHING NONCONFORMING USES-LEGALITY OF CONSTRUCTION OR USE.

"Zoning prohibitions have been regarded as applicable notwithstanding the commencement of operations for the construction of a non-conforming building, or a building to be used for a nonconforming purpose, where the work was *commenced without a permit,* 86 ALR 687, 117 ALR 1117 and continued after enactment of the zoning ordinance in definite and conscientious violation thereof." 86 ALR 687, 58 Am Jur.

This rule operates on all alike.

In the leading case of *City of Harrisburg v. Pass,* 93 A. (2) 477-372 Pa. 318 (1953) the court laid down the rule that "in order to enable an owner to claim such right, (a nonconforming use) he must establish that his expenditures were made in reliance on a building permit previously issued to him, that they were made before the enactment of the ordinance and that they were substantial in amount."

The use cases have developed a rule that a land owner has no vested right to build his proposed use unless he has first obtained a lawful permit and then in good faith, incurred substantial expenditures or liabilities in reliance on the permit, before the adoption of the

prohibitory zoning ordinance of amendment. *Schecter v. Zoning Board of Adjustment,* 395 Pa. 310, 149 A (2) 28; *Shender v. Bd. of Adjustment,* 388 Pa. 265, 131 A (2) 90; *Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586; *Harrisburg v. Pass,* 372 Pa. 429, 61 A (2) 839; *Ventresca v. Exley,* 358 Pa. 98, 56 A (2) 210; *Lower Merion v. Frankel,* 358 Pa. 430, 57 A. (2) 900; *Gold v. Building Comm. of Warren Borough,* 334 Pa. 10, 5 A (2) 367; *Herkovitz v. Irwin,* 299 Pa. 155.

There is nothing in this record to establish that Yeckos made any expenditures whatsoever. They had not yet purchased the land. Even the purchase of land itself has never been held to constitute good faith reliance. True, they had entered into an agreement to purchase it but reserved the right to withdraw. The expenditure in that respect must be considered *nil.* They did not prove they purchased any junked automobiles relying on the opening and carrying on of that specific business. They could have been moved from another location.

Aberman, Inc. v. New Kensington, 377 Pa. 530, 105 A (2) 586, indicated that the time of the introduction of the amendment before the legislative body could be important, because the commencement of construction in the face of a proposed amendment could, at the least, be treated as evidence of a lack of good faith.

Yocum v. Power, 398 Pa. 223, 157 A (2) 368 (1959) wherein the opinion says that an unpassed bill has no more governmental authority than "a scribbled note on the back of an envelope in the pocket of the legislator," gives an inkling as to what is meant from the fact that the court distinguishes it from *Aberman v. New Kens-*

ington on the ground that the building permit there was obtained in an effort to circumvent a "general zoning law." Another distinguishing feature of the *Yocum* case may be found in the court's characterization of the proposed amendment as special legislation aimed specifically at the church's property. *The church's permit* prevailed therefore not because it had vested irrevocably, *but because no valid amendment ever came into being to conflict with it.*

STRICT CONSTRUCTION

PROVISIONS FOR CONTINUATION OF NONCONFORMING USES STRICTLY CONSTRUED

"The spirit of zoning ordinances and regulations is to restrict rather than increase any nonconforming uses, and to secure their gradual elimination." C.J.S. "Zoning" Sec. 182, P. 939, *Appeal of Wolfson*, 47 Del. Co. 64,

> Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary.
>
> *Beck v. Zoning Bd. of Adjustment*, 69 Pa. Dist. & Co. 438

Therefore, provisions of zoning regulations for continuation of such uses are strictly construed. *Morrison v. Abington Twp.* 77 Montg. 158.

In 1962 in *Hanna v. Board of Adjustment*, 408 Pa. 306, 183 A (2) 539, the Supreme Court approved the decisions of the lower courts when it frowned on nonconforming uses to a degree never before evidenced in the Pennsylvania courts by stating that the POLICY OF THE LAW IS TO RESTRICT THEM TO CONFORMITY AS SPEEDILY AS POSSIBLE.

There cannot therefore be any reason to believe that the requirement that the expenditures were substantial in amount was met. Finally, Yeckos did not obtain a permit. (P. 47a) True, the Chancellor found that at the time defendants established their business there was no legal requirement for a use or occupancy permit (Conclusion No. 10). Certainly in view of the City of Harrisburg case and other Pennsylvania cases so holding, it is respectfully submitted that this Conclusion is clearly in error.

However, we will consider that the fact is that they did ask for a permit. But when they were not granted one they were not excused from procuring one. It has been held that fruitless attempts to obtain a permit are not sufficient. *Sheen v. Mencer*, 52 D & C 422 (1945).

If the defendants had shown that the owner had obtained a valid permit and had either done substantial constructing or incurred substantial liabilities we could have no quarrel with the defendant's rights to continue. They must have shown acts of a substantial nature both as to use and money expended in reliance on a permit. This was not the case here.

A vested right to build a structure which violates a zoning ordinance can only be acquired by securing a building permit and expanding substantial sums in reliance on the permit. *Beverly Bldg. Corp. v. Bd. of Adjustment*, 187 A (2) 567.

Other factors which should be considered in a final determination are:

> Did the defendants act in good faith, or were they merely trying to "beat" the ordinance?

Argument.

Was the fact that Zoning was under consideration given public notice?

The evidence all indicates the defendants were trying to "beat" the ordinance.

For a period of about three years the Township considered the advisability of adopting a zoning ordinance. One such ordinance was drafted and presented and after public hearings, was rejected. Subsequently Ordinance No. 39 was advertised on June 28, 1962, for passage August 13, 1962. A bus and a few cars were placed on the premises after defendants tried unsuccessfully to obtain a permit on July 27, 1962.

On July 9, 1962, the defendants appeared before the Board of Supervisors for the purpose of obtaining a use and occupancy permit. The fact of the pendency of a zoning ordinance was then common knowledge. They were advised by the supervisors to contact Norman Patterson, Chairman of the Planning and Zoning Commission. There they were also advised that a public meeting on the Zoning Ordinance had been advertised for July 17, 1962, and that all proposals such as defendants made must be submitted to the Planning and Zoning Commission for approval, pending rejection or adoption of the Ordinance by the Board of Supervisors. (P. 47a)

It was decided in *Aberman, Inc. v. City of New Kensington,* 377 Pa. 520, 528, 105 A (2) 586, 589, that a municipality may properly refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations.

In considering the evidence one must conclude that there is no question about whether or not defendants knew there was a zoning ordinance in contemplation. Otherwise, why did they go to the trouble of going to the Supervisors and Board of Adjustment for a permit? They only decided to establish this nonconforming use after they were refused the permit. There is no evidence whatsoever that the owner because of the time involved in writing, approving and passing the ordinance was presented with the choice of either postponing construction indefinitely or "taking a chance" with the zoning ordinance. They acted for the first time 17 days before the ordinance was passed, but still did not take title to the land.

ON QUESTION OF HARDSHIP WEIGHING THE INTEREST OF INDIVIDUAL V. THE PUBLC.

Zoning as it affects every piece of property is to some extent retroactive in that it applies to land already owned at the time of the ordinance and the effect of zoning restrictions may be to depreciate sharply the value of a particular plot of land. A good example of this is EUCLID F. AMBLER REALTY CO., 272 U. S. 365 (1926) the leading case upholding zoning as a legitimate exercise of the nonconforming police powers. Here the Supreme Court of the United States sustained zoning restrictions on vacant land directly in the path of Cleveland's industrial development, with the effect that value was reduced from $10,000.00 to $2,500.00 per acre. Although in the ordinary case the effect is not nearly so drastic, the case serves to highlight the possibility of loss when any land is restricted. The economic hardship inherent in retro-

activity cannot be relied on therefore as the sole reason for protecting existing nonconforming uses.

It is recognized by the decisions that zoning is a collection of restrictions and every restriction means a possible loss to someone. "THE EASIEST AND MOST WORKABLE PLACE TO DRAW THE LINE IS AT THE "EXISTING USE."

II. The Owner Seeking to Establish a Nonconforming Use, Acts at His Own Risk, as a Balancing of the Public Interest Against the Private Interest Leads to the Conclusion That Protection Is Justifiable.

The rule which requires substantial construction before an existing use will be declared also seems in the light of the weighing of interests to be justifiable. There is no interference with a going business or good will accompanying removal or even substantial construction.

"A 'nonconforming use' has been defined as the use of a building or land which does not agree with the regulations of the use district in which it is situated.

"Nonconformity may relate to some general use, as for example, the conduct of a business, or it may relate to some more limited aspect of use."

26 P. L. E. Sec. 450

26 Pennsylvania Law Encyclopedia Sec. 450

The lower court was swayed in this case and by the statement which often appears in the cases that "an existing use" is the utilization of premises so that they may be known in the neighborhood as being employed for a given purpose. *Haller Baking Company's Appeal*, 295 Pa. 257 (1928). This is not alone the criterion—see infra.

NOTICE OF PENDING ORDINANCES AND ITS EFFECT.

Shender v. Zoning Board of Adjustment, 388 Pa. 265, 131 A (2) 90 (1957) and *A. J. Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586 are consistent with the policy, evidenced in prior decisions of prevent-landowners from getting in under the wire.

In *Gold v. Building Comm. of Warren Borough,* 334 Pa. 10, 5 A (2) 367, the zoning ordinance had passed two readings in Council before the filing of an application for a permit. In *A. M. "A. B." Young Co. Zoning,* 360 Pa. 429, 61 A (2) 839 the ordinance had been introduced in council and public notice given before the filing of the application. In *Aberman v. New Kensington,* 377 Pa. 520, 105 A (2) 586, the commission after public notice held public hearings and then submitted its final report to council recommending the proposed zoning. The application was filed on the same day the report was filed. THE COURT CONCLUDED THAT THE PERMIT WAS SOUGHT NOT IN GOOD FAITH, BUT IN ANTICIPATION OF AND IN AN EFFORT TO CIRCUMVENT THE ORDINANCE. In *Shender v. Zoning Bd. of Adjustment,* 388 Pa. 265, 131 A (2) 90, the absence of a public hearing was held to be of no material effect even though the city had publicly declared its intention to rezone the area some two years before the relevant application was filed.

In this case the very agreement itself shows that defendants knew of the pendency of the ordinance. The legal advertisement for a public meeting appeared in print June 28, 1962. On July 2 they entered into the written agreement to purchase and retained the right to withdraw if an ordinance prevented them from continuing. (P. 49a)

If this nonconforming use is allowed to continue it will have in effect a monopoly in Penn Township, despite the fact that this was a most obvious attempt to get in under the wire. A use must be what is "customarily and habitually done" on the premises and thus cannot be established by occasional acts on the land. In Maryland where the law on nonconforming uses is very similar to Pennsylvania's in the case of *Baltimore v. Shapiro,* 187 Md. 623, 51 A. (2) 273 (1947) it was held that dismantling cars on several occasions did not establish a use.

THE USE ESTABLISHED IN THIS CASE WAS INSUFFICIENT TO ESTABLISH A VESTED RIGHT.

Nonconforming uses are specially created in two ways. First of all, a nonconforming use may be created by the zoning board itself. With this type we are not concerned except to distinguish the law concerning such uses which depend upon the board for continued existence. Secondly, however, nonconforming uses may exist because the use of the property antedates the zoning ordinance.

As to this latter manner of creation the cases branch off in two directions. There are the cases where a bona fide nonconforming use existed prior to the passage of the ordinance. In short, where there is no question that a nonconforming use did exist. The zoning law in these cases always deals with questions of expansion of the use, alteration of plants, abandonment or temporary discontinuance. Then there are those cases like ours where the use is attempted to be established immediately before or immediately after the passage of the ordinance and the question as to whether the use really antedated

the ordinance. Here the question is, did the use actually exist before the ordinance went into existence? If an owner merely had a building permit, but no outstanding contracts and no actual construction on his land at the time the ordinance was passed, there was no use prior to the ordinance. Each case turns on the quantum of proof. This latter it is respectfully submitted, is the category into which the Yecko case falls.

In the discussion of the issues the court found that the requirements of *Haller Baking Company's Appeal*, 295 Pa. 257 (1928) were met. (P. 56a) These requirements in that case were:

> "As, understood in the ordinance, the existing use should mean the utilization of the premises so they may be known in the neighborhood as being employed for a given business, i.e., the conduct of a business.
>
> "Ordinarily, an existing use for business combines two factors: (a) construction of a building or room for the purpose, and (b) employment of the building or room or land within the purpose."

CONCLUSION

The Petitioners Are Not Deprived of Any Rights Under the Fourteenth Amendment to the Constitution

The petitioners owned no property. They entered into an agreement to purchase if the Zoning Ordinance in question was not effective against them. They were fully aware of the ordinance, they knew of its possible effect and provided against the eventualities by making an agreement for purchase only in case the ordinance would not be effective.

> A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws. National Carloading Corp. v. Phoenix-El Paso Express, 142 Tex. 141, 176 SW (2) 564, cert. den. 322 U. S. 747, 88 L. Ed 1578, 64 S. Ct. 1156.

Respondent prays that the Writ of Certiorari be refused.

Respectfully submitted,

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